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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GERALD PATRICK MATHIS, Defendant and Appellant.	B282869 (Los Angeles County Super. Ct. No. NA102983)

APPEAL from a judgment of the Superior Court of Los Angeles County. Laura L. Laesecke, Judge. Affirmed as modified and remanded with directions.

Carlo Andreani, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, David E. Madeo and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Gerald Patrick Mathis (defendant) appeals from the judgment entered after he was convicted of robbery and false imprisonment. Defendant contends that the trial court erred in granting his motion for self-representation; that he was deprived of due process when the court permitted defendant's expert witness to answer certain questions posed by defendant; that the court gave an erroneous instruction when a juror was replaced by an alternate juror at the start of deliberations; that substantial evidence did not support the court's finding that one of defendant's prior convictions was for a serious felony; that five-year enhancements added to the sentences on counts 5 and 6 were unauthorized; and that he is entitled to additional presentence custody credit. In addition, defendant requests review of the sealed transcript of the in camera hearing on his *Pitchess*[1] motion, and asks that the matter be remanded to allow the trial court to exercise its discretion under a recent amendment to Penal Code section 667.[2]

We remand the matter to allow the trial court to exercise its discretion under section 667. However, as the sealed transcript has not been included in the record on appeal, we deem the request for review abandoned. We find no merit to defendant's remaining contentions, and thus affirm the judgment.

BACKGROUND

Defendant was charged in counts 1 and 2 with second degree robbery in violation of section 211; in counts 3, 4, 5, and 6, with false imprisonment by violence in violation of section 236; and in count 7, with kidnapping to commit robbery in violation of

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1 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

2 All further statutory references are to the Penal Code, unless otherwise indicated.

section 209, subdivision (b)(1). It was further alleged that defendant had incurred two prior serious or violent felony convictions within the meaning of section 1170.12, subdivisions (a) through (d), and section 667, subdivisions (b) through (i) (the Three Strikes law), and six prior prison terms within the meaning of section 667.5, subdivision (b). As to counts 1 and 2, the information alleged that defendant had suffered two prior serious felony convictions (§ 667, subd. (a)(1)).

A jury found defendant guilty of counts 1 through 6, and not guilty of count 7. After defendant waived a jury trial on the prior conviction allegations, they were then tried to the court. The trial court found the prior conviction allegations to be true, and denied defendant's motion for new trial, to strike either of his two prior strike convictions pursuant to section 1385, and to reduce the false imprisonment convictions to misdemeanors.

On April 28, 2017, the trial court imposed a total prison term of 88 years and four months to life, calculated as follows: count 1 was selected as the base term, and a term of 36 years to life, comprised of a third-strike term of 25 years to life, plus two five-year enhancements pursuant to section 667, subdivision (a), and a one-year enhancement for the prison prior conviction in case No. BA034044, pursuant to section 667.5, subdivision (b), was imposed. Finding that count 2 involved a separate victim, the court imposed a consecutive term identical to the term for count 1. As to each counts 3 and 4, the court imposed the middle term of two years, and stayed the terms under section 654. Finding that count 5 involved a separate victim, the court imposed a consecutive two-year term, doubled to four years as a second strike, plus two five-year enhancements pursuant to section 667, subdivision (a), and a one-year enhancement for the prison prior conviction pursuant to section 667.5, subdivision (b), for a total of 15 years. Finding a separate victim and several

aggravating factors as to count 6, the court sentenced defendant consecutively to a one-third middle term of eight months, doubled as a second strike, for a total term of one year four months. The court imposed mandatory fines and fees, and awarded 1,027 days of custody credit, consisting of 893 actual days and 134 days of conduct credit.

Defendant filed a timely appeal from the judgment.

Prosecution evidence

On September 13, 2012, at approximately 8:00 p.m., two men robbed a Radio Shack store on East Willow Street in Long Beach. When the two men entered the store, there were four people inside, customer Luz Maria Loza, her daughter Leslie, store employee Ricky Ixtlilco, and store manager Juan Mares. As Loza was speaking to Ixtlilco about a cell phone, Leslie told her they needed to get on the floor. Once Loza turned, saw her daughter lying on the floor and a man standing behind her, she lay down as well. The man was wearing a hooded sweater or "hoodie," with a black or dark blue bandanna covering his face below his eyes. He kept one hand in his hoodie pocket and carried a bag in his other hand. Loza saw that he was African-American. The man approached Ixtlilco, searched his pockets, took merchandise from the counter and put it in his bag and then led Ixtlilco to the cash register, out of Loza's sight. Loza was afraid and her daughter was crying. Loza heard a noise from the back of the store, where she saw a second man emerge wearing a white mask covered with dots or little holes. Soon Loza heard a police siren, and the man with the mask yelled something. She saw him run toward the exit and out of sight.

Leslie testified that the man who yelled at them to get on the floor wore a dark-colored bandanna over the bottom half of his face, and his head was covered with the hood of a hoodie. She saw his hand and could tell that he was African-American. She

was nervous and scared throughout the robbery. She also saw the other man who emerged from the back of the store wearing a white mask. It was like a plastic Halloween mask with holes in it, and it covered the whole face. She saw him communicate with the man wearing the bandanna.

Ixtlilco testified that he was speaking to his two customers about phones, when suddenly two men rushed in through the front door and told them to get down on the floor. One of the men, an African-American, wore a hoodie with the hood up, and a dark blue bandanna that covered his nose and mouth. The other man was wearing a white "Jason mask" with holes in it.[3] The man with the mask ran to the back of the store, while the man in the bandanna stayed on the sales floor, keeping his right hand in his pocket the whole time. Ixtlilco was afraid he might have a weapon. The man asked for the keys to the back room for the "good stuff." Ixtlilco gave him the keys to both the manager's office and the storage room, because he was afraid for his life.

Mares testified that he was in his locked office where he saw on the video monitor images of the two robbers as they entered the store. He observed as one of the men, the man wearing a hoodie and a blue bandanna, said something to the customer and her daughter which caused them to lie on the floor. Mares called the police and was speaking to them when he quickly hung up after he saw the door handle turn. A man wearing a white mask came in, apparently having used Ixtlilco's keys to unlock the door, and asked Mares if he had called the police. Mares said no. The robber took the cash off Mare's desk and placed high-end, expensive merchandise into a duffle bag. The 911 operator called back, and Mares pretended to be

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[3] The mask was similar to a hockey mask worn by a movie character named Jason.

speaking to a customer. Soon, sirens could be heard and the robber left. On the video monitor, Mares saw the masked robber run out the back door and the man wearing the hoodie and blue bandanna run out the front door. After the robbers left, all the money was missing from the register, including a stack of 25 one-dollar bills with a rubber band around it. However, the duffle bags containing expensive routers, smart phones, small laptops, and tablets were left behind.

Within 30 seconds to a minute, multiple police units responded to the 8:12 p.m. robbery-in-progress call that went out from dispatch. A containment perimeter surrounding the Radio Shack store was established on Willow Street, Pine Avenue, and Earl Street. From her position in the alley behind the store, Detective Jacqueline Parkhill saw the emergency door open and a man emerge wearing a Jason mask. As the man fled toward Earl Street, Detective Parkhill called out his location and direction to other officers, and returned to the emergency exit in case other suspects emerged.

Detectives Ricardo Solorio and Jeffrey Conrad were positioned at Willow Street and Pine Avenue with a view of the store, when they saw two men in front. One was African-American, wearing a hoodie with the hood up, obscuring his face. The man ignored commands to stop and show his hands, and kept walking away. As the detectives pursued him on foot, the man climbed over a wall to the alley. When Detective Parkhill saw the man walking toward her, she pointed her gun at him, and told him to take his hands out of his pockets and to get on the ground. The man failed to comply. When Detectives Solorio and Conrad appeared, the man was pushed to the ground and handcuffed. The three detectives all identified the man in court as defendant.

After defendant was handcuffed, his dark bandanna was pulled down from his mouth before defendant was placed in the back seat of a patrol car. The detectives did not question defendant who spontaneously said, "I'm sorry. I was just starving."

In the meantime, Officer Jorge Marquez saw a male suspect come from the rear of the store and run toward him, just as he received Detective Parkhill's radio call. Ignoring Officer Marquez's commands to stop, the man ran and jumped into the backyard of a house on Earl Street. Officer Marquez and other officers detained him when he came out of the yard, and later found a Jason mask on Earl Street just south of the alley.

Within an hour or so after defendant was arrested, police officers took each of the four victims to a location where the suspects were being held prior to being transported to jail, and conducted separate single-person field showups. Defendant still wore the same clothing he wore when he was detained, including the hoodie and the bandanna around his neck. The jury was shown a photograph of defendant as he appeared in the showups, with his face partially covered, and one with his full face showing. The detective who accompanied Ixtlilco to the showup location, testified that defendant's hood was still up, and the detective pulled up the bandanna onto defendant's face the way the Ixtlilco had described. Ixtlilco immediately identified appellant, stating, "Yeah, that's him. He's the one that walked around. He did pretty much everything." Mares also identified defendant, due to the exactly matching clothing. Loza identified defendant as the robber with the bandanna, but only because his clothing was the same, as she had not seen his face. Leslie also identified defendant as the robber who wore the bandanna on the basis of his clothing.

Defense evidence

Forensic DNA consultant Mehul Anjaria testified that she tested $31 in currency found in the alley outside the Radio Shack and found no male DNA on the bills. Detective Parkhill testified that $1,225 was found on defendant's former codefendant, when he was arrested.

Psychologist Mitchell Eisen, a defense expert on eyewitness memory and suggestibility, testified that a traumatic event can interfere with memory, as it profoundly divides the witness's attention, interfering with normal processing of information and transferring that information into long-term memory. He also explained some other factors that affect memory, such as people's tendency to fill memory gaps with inferences, sometimes accurately and sometimes inaccurately. Brief glances of a person's face make identification more difficult than longer exposure. Dr. Eisen explained why identifications given immediately after an event tend to be more detailed and more accurate than later reports, and how details of the event might be lost during the hours or days after the event. He also explained the effect of exposure to new information, and how over time, this "post-event information" might affect a memory.

Dr. Eisen testified that research had also shown that confidence in an identification was not a good indicator of accuracy, as witnesses were sometimes 100 percent certain in their mistaken identifications. In addition, confidence in an identification might have been bolstered by such factors as knowing that other witnesses identified the same person, that law enforcement believed that the right person was identified, or other evidence supporting the original selection. Dr. Eisen also discussed the difficulties inherent in cross-racial identification.

In Dr. Eisen's opinion, a showup with just one person was "inherently suggestive," as a witness might "make unwarranted

assumptions" that the right person was displayed. Dr. Eisen added: "[Witnesses] don't know that people can be stopped in the community just because they happen to be in an area that matches a description. They think if you're going to handcuff somebody, you must have reasons." A lineup composed of several persons provided better protection against a false identification. "Clothing bias" occurs when people are influenced by similar or matching clothing to make assumptions, as opposed to recognizing the person's face. Thus witnesses might infer guilt from the fact that a person was detained soon after the crime wearing similar clothing in the same area.

Ira Callahan, defendant's acquaintance of 27 years, testified that defendant arrived at his apartment the night of the robbery between 6:00 p.m. and 9:00 p.m. Defendant bought two ounces of marijuana from him for about $600, they smoked marijuana together, socialized for a bit, and then walked together north on Earl Street, until Callahan left him at about 25th Street. At the time of his testimony, Callahan was incarcerated for narcotics sales. He had been a drug dealer for years, and suffered prior convictions and juvenile adjudications for drug sales and possession, as well as a 1994 kidnapping due to a robbery conviction.

DISCUSSION

I. Waiver of right to counsel

Defendant represented himself during the preliminary hearing, and renewed his motion for self-representation at the time of arraignment on the information. Defendant contends that at the time his renewed motion was granted, he was not fully informed and was misinformed of the possible maximum sentence he could receive if convicted. He thus concludes that the waiver of an attorney is invalid as not having been made

voluntarily, knowingly, and intelligently, in violation of his Sixth Amendment right to representation by counsel.

The Sixth Amendment to the United States Constitution grants criminal defendants the right to counsel in all proceedings that may substantially affect their rights. (*Mempa v. Rhay* (1967) 389 U.S. 128, 133-134.) The right to counsel may be waived if the waiver is knowing and intelligent, and made with "'eyes open.'" (*Faretta v. California* (1975) 422 U.S. 806, 807, 835; *People v. Bradford* (1997) 15 Cal.4th 1229, 1363.) So long as the defendant's request is made knowingly and voluntarily, and asserted within a reasonable time prior to trial, the right of self-representation is absolute. (*People v. Doolin* (2009) 45 Cal.4th 390, 453.)

"In deciding whether a waiver is knowing and voluntary, we examine the record as a whole to see whether the defendant actually understood the consequences and import of the decision to waive counsel, and whether the waiver was freely made. [Citation.] There is no prescribed script or admonition that trial courts must use in warning a defendant of the disadvantages of self-representation. But, in whatever way the trial court chooses to explain the perils of self-representation, the record as a whole must establish that the defendant understood the 'dangers and disadvantages' of waiving the right to counsel, including the risks and intricacies of the case. [Citations.] We review a *Faretta* waiver de novo, and examine the whole record to determine the validity of a defendant's waiver of the right to counsel. [Citation.]" (*People v. Mickel* (2016) 2 Cal.5th 181, 211-212.)

Defendant acknowledges that the court fully informed him of his rights and of the disadvantages of self-representation. He had been thoroughly informed twice before he renewed his motion at arraignment, and even attempted to waive the third

advisement, but the court insisted.[4] Defendant stated that he understood. However, he contends that his *Faretta* waiver was defective because the trial court failed to advise him of all possible penalties for the charged offenses. In particular, defendant argues that a defendant must be informed of all potential penal consequences, including each potential maximum sentence for each count and the details of all potential enhancements, as well as the total potential aggregate sentence.

"The failure to give a particular set of advisements does not, of itself, show that a *Faretta* waiver was inadequate. Instead, '[t]he burden is on [defendant] to demonstrate that he did not intelligently and knowingly waive his right to counsel. . . . [T]his burden is not satisfied by simply pointing out that certain advisements were not given.' [Citations.]" (*People v. Weber* (2013) 217 Cal.App.4th 1041, 1058-1059.) Defendant relies primarily on *United States v. Erskine* (9th Cir. 2004) 355 F.3d

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[4] The court determined that defendant did not finish high school, had studied electrical construction maintenance in trade school, had not taken any courses on the law, had previously been through trial represented by counsel, had represented himself at the preliminary hearing in this case, had no history of mental or emotional illness, and had not been given psychotropic mediation. The court informed defendant that if he wished to have counsel and could not afford counsel, he had the right to appointed counsel free of charge, that if he represented himself, he was required to follow the same legal rules as competent lawyers, even if he did not know what they were, and that except in limited circumstances, if he made a mistake that might be a basis for reversal if made by a lawyer, he could not rely on his own mistakes for any relief. The court expressed the opinion and position that it was a mistake for defendant (or anyone else) to represent himself, because he might think he was doing something to assist his case, when it was actually hurting his case.

1161, 1164-1165 (*Erskine*), which does not hold otherwise, but turned on evidence showing that defendant *misunderstood* the potential punishment. There, the trial court inquired whether the defendant understood the possible penalties he faced, but did not correct him when he responded with, "Maximum amount is one year," when in fact, the maximum penalty was five years. In addition, the prosecutor's trial memorandum understated the maximum penalty. *Erskine* does not support defendant's claim that the court must give particular or detailed information about potential penal consequences as a matter of course. Instead, the court's obligation was to clarify the defendant's obvious misunderstanding regarding potential penal consequences. (*Id.* at p. 1165.) As the court pointed out, "the 'appropriate inquiry is what the defendant understood -- not what the court said . . . .'" (*Id.* at p. 1169.)

Here, the trial court did not fail to provide clarification when defendant expressed his understanding of the potential penal consequences. Defendant's argument to the contrary is based upon his misquotation of one of the trial court's statements, while ignoring another statement altogether. Throughout his briefs, defendant claims that the court merely said, "So it's life plus 22 years," and he disregards altogether the court's statement that it was "life *plus a large number of years*." (Italics added.) Defendant argues that the information he was given by the court was incorrect because he was ultimately sentenced, not to 22 years to life, but to 36 years to life on each of counts 1 and 2, and that the aggregate sentence imposed was 72 years to life plus 16 years 4 months. Contrary to defendant's characterization of the proceedings, when the trial court asked him what he thought the maximum sentence would be if he were convicted on all counts and all allegations were found to be true, defendant replied that the kidnapping charge (count 7) would be

a mandatory life sentence, and because he was a second-striker, even the robbery count would be life. The court agreed that count 7 was a life case, but stated that it was "life *plus a large number of years*." (Italics added.) After the prosecutor stated that it would be life plus 22 years, the court said to defendant, "So it's life plus 22 *plus*." (Italics added.) As defendant was sentenced to "life plus a large number of years" or "22 plus" years, the trial court did not fail to clarify defendant's perception of the potential punishment.

Defendant asks that we rigidly follow decisions which suggest or hold that a court taking a *Faretta* waiver must advise the defendant of potential penal consequences, and that we decline to follow state decisions which hold that the court has no such obligation.[5] Defendant's argument begs the question whether an obligation to advise the defendant of potential penal consequences necessarily requires the court to advise the defendant of the specific *detailed* consequences, including of all potential enhancements, as well as the total potential aggregate

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[5] Federal cases cited by defendant which favor an advisement of the possible penalties include *United States v. Forrester* (9th Cir. 2008) 512 F.3d 500, 507, *Erskine*, *supra*, 355 F.3d at p. 1167, and *Henderson v. Frank* (3d Cir. 1998) 155 F.3d 159, 166. Among the California courts considering the issue, one court pointed out that some cases "have suggested that, to deem a *Faretta* waiver knowing and intelligent, the trial court must or should ensure the defendant understands the possible penalties . . . . [Citations.]" (*People v. Conners* (2008) 168 Cal.App.4th 443, 455, citing *People v. Sullivan* (2007) 151 Cal.App.4th 524, 545; *People v. Noriega* (1997) 59 Cal.App.4th 311, 319.) "On the other hand, one case has expressly held there is no requirement to advise a defendant seeking to represent himself of the possible penal consequences of conviction [Citation.]" (*Conners*, at p. 455, citing *People v. Harbolt* (1988) 206 Cal.App.3d 140, 149-151.)

sentence. "The test of a valid waiver of counsel is not whether specific warnings or advisements were given but whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case. [Citations.]" (*People v. Bloom* (1989) 48 Cal.3d 1194, 1225.) "'[A]s long as the record as a whole shows that the defendant understood the dangers of self-representation, no particular form of warning is required.' [Citations.] '[T]he focus should be on what the defendant understood, rather than on what the court said . . . .'" (*People v. Burgener* (2009) 46 Cal.4th 231, 241.)

Defendant contends that his reasoning finds support in *Iowa v. Tovar* (2004) 541 U.S. 77. In *Tovar*, unlike here, the defendant waived the assistance of counsel to enter a *guilty plea*, and the United States Supreme Court observed that "the Sixth Amendment . . . is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the *range of allowable punishments* attendant *upon the entry of a guilty plea*." (*Id.* at p. 81, italics added.) Defendant focuses on the word, "range," to support his belief that the requirement of a detailed advisement is found in the Supreme Court's statement. However, the court did not hold that the details of the precise range of all possible penal consequences must be given whenever a defendant seeks to waive counsel. (*Ibid.*) On the contrary, it held that when entering a guilty plea, rather than a mandatory script of warnings, "the information a defendant must have to waive counsel intelligently will 'depend, in each case, upon the particular facts and circumstances surrounding that case,'

[citation]." (*Id*. at p. 92.)[6] Indeed, the court observed that "'[t]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances -- even though the defendant may not know the *specific detailed* consequences of invoking it.' [Citation.] . . . 'If [the defendant] . . . lacked a full and complete appreciation of all of the consequences flowing from his waiver, it does not defeat the State's showing that the information it provided to him satisfied the constitutional minimum.' [Citation.]" (*Ibid*.)

Defendant claims that his expansive interpretation of the Supreme Court's use of the word "range" in *Tovar* is supported by *Arrendondo v. Neven* (9th Cir. 2014) 763 F.3d 1122, 1130, but that court held only that *Tovar* "established that a defendant must have a *general* understanding of the potential penalties of conviction before waiving counsel . . . ." (Italics added.) And the court pointed out that it is "generally presume[d] that defendants seeking to waive their right to counsel understand what they are told regarding that choice. [Citations.]" (*Id*. at p. 1132.) Here, defendant acknowledged that he had been given a copy of the information, which charged him with seven felonies, and he was

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6 As one court observed, the advisement "of 'the range of allowable punishments attendant upon the entry of a guilty plea' cannot practically be applied to a defendant desiring to represent himself at trial. The essential difference is that, while in a guilty plea setting the crimes and enhancements for which the defendant can be punished are known, in a case such as ours where the defendant is going to trial the jury may or may not convict the defendant of the crimes or find true the enhancement allegations. This makes it impractical to try to predict the possible terms and enhancements that will eventually be available to the trial court at sentencing." (*People v. Jackio* (2015) 236 Cal.App.4th 445, 454.)

able to describe the charges for the court. Defendant stated that he understood that he was subject to at least two life terms. The court clarified that he could receive at least life in prison *plus* more than 22 years. As respondent notes, at this hearing on December 22, 2015, defendant was 47 years old. Defendant thus understood that if convicted, he would probably spend the rest of his natural life in prison.

Defendant does not claim that he did not have a general understanding of the potential penalties if convicted. Defendant does not even point to evidence of mistake or confusion or any other state of mind that might suggest a lack of understanding of the potential punishment or even the "range" of potential penalties. Where the defendant "neither alleges nor shows that he personally failed to hear and understand [the court's] statement . . . we must presume . . . that what is heard is understood." (*In re Johnson* (1965) 62 Cal.2d 325, 332, fn. omitted; see also *Arrendondo v. Neven*, *supra*, 763 F.3d at p. 1132.) We conclude that defendant understood that he faced two life sentences plus a large number of years exceeding 22 years, and that he thus had a general understanding of the potential penalties if convicted. No more was required. (See *People v. Burgener*, *supra*, 46 Cal.4th at p. 241; *People v. Bloom*, *supra*, 48 Cal.3d at p. 1225.)

II. Expert witness testimony

Defendant contends that answers elicited by his own questioning of his own eyewitness identification expert were improper, infringed on his Sixth Amendment right to self-representation, deprived him of his right to due process and were prejudicial. Defendant refers to the following colloquy:

"Q. Did you interview the defendant in this matter?

"A. The defendant? No, I never met you before.

"Q. Why not?

"A. Well, because I don't meet with pro pers. People who defend themselves. I agree to consult on these cases. I agree to work with the investigator or what is called standby counsel, if there is somebody there, but I don't go to the jail and meet with folks. My advice to people defending themselves is get yourself a lawyer. If you decide not to, I will consult with your investigator and give the same type of consultation services to the investigator that I would give to any given attorney.

"Q. Why?

"A. Well, because I think pro pers should get lawyers, and because I don't think the courts should be paying for me to wait in line in jail because I charge kind of a lot, and I think that would not be a good use of the county's money."

Defendant did not object or move to strike the answers. "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion." (Evid. Code, § 353.)[7] As defendant failed to make a timely and specific objection or motion

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[7] In his reply brief, defendant argues for the first time that the comments are irrelevant and nonresponsive; they were inadmissible legal opinions; the advice to retain a lawyer amounted to the unauthorized practice of law; and they were improper expert testimony. "'[I]t is elementary that points raised for the first time in a reply brief are not considered by the court.'" (*People v. James* (2011) 202 Cal.App.4th 323, 328, fn. 3.)

to strike, he has forfeited his appellate challenge to the admission of the evidence. (See *People v. Partida* (2005) 37 Cal.4th 428, 433-435.) Defendant nevertheless contends that the expert's answers were so improper that they amounted to constitutional error, and he further contends that because they amounted to constitutional error, he should be excused from his failure to preserve his challenge to them for review on appeal. On the contrary. As defendant's failure to object to the testimony included a failure to make any claim of constitutional error, he has forfeited any challenge based upon federal constitutional error. (*Id*. at pp. 435-439.)

We agree with respondent that defendant's claim is essentially one of ineffective assistance of counsel, which is not available to him as a pro. per. litigant. "The right of self-representation is not . . . a license not to comply with relevant rules of procedural and substantive law. Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'" (*Faretta, supra*, 422 U.S. 834, fn. 46.)

Regardless, we disagree with defendant's contention that Dr. Eisen's comments may have contributed to the verdict. Even if the jury had agreed with Dr. Eisen's opinions that innocent citizens might be rounded up, dressed up, and placed in showups, that showups are suggestive, that trauma interferes with memory, and that matching clothing can lead witnesses to make assumptions, the evidence that defendant was properly identified as one of the robbers was overwhelming. Defendant was seen by officers at the front entrance to the Radio Shack shortly after Mares watched the video image of the man in the hoodie and bandanna running out the front door. Defendant displayed a consciousness of guilt by ignoring police commands and fleeing

into the alley next to the store, while within the view of a detective. Within an hour after defendant's capture, all the victims testified that the clothing worn by defendant was the same clothing worn by the robber. As Dr. Eisen explained, identifications given immediately after an event tend to be more detailed and more accurate.

III. Instruction regarding juror substitution

Defendant contends that the trial court gave erroneous instructions to the jury when it substituted an alternate juror in place of a juror who had been participating in deliberations.

Section 1089 allows for substitution of jurors with alternates, and constitutional considerations require that deliberations begin anew when a substitution is made after final submission to the jury. (*People v. Collins* (1976) 17 Cal.3d 687, 694.) Thus, the trial court must instruct the jury "to set aside and disregard all past deliberations and begin deliberating anew. The jury should be further advised that one of its members has been discharged and replaced with an alternate juror as provided by law; that the law grants to the People and to the defendant the right to a verdict reached only after full participation of the 12 jurors who ultimately return a verdict; that this right may only be assured if the jury begins deliberations again from the beginning; and that each remaining original juror must set aside and disregard the earlier deliberations as if they had not been had." (*Ibid.*)

At the time of making the substitution, the trial court instructed the jurors as follows:

> "[Y]ou cannot start deliberating until all twelve of you are here. Technically, I need to tell you that because you rotated out Juror No. 6, if you have done any significant deliberations beyond just picking a foreperson, the law requires that you start those over. Basically bring the new juror up to speed and allow

her to air her, you know, issues on her -- whatever, her input is as well, so when you start again tomorrow. Anybody have any questions about the procedure? Okay. Very good."

Defendant contends that it was error to the words, "technically" and "up to speed," and that the trial court's instruction failed to include all the information recommended by the California Supreme Court in *People v. Collins*, *supra*, 17 Cal.3d at page 694. Defendant also contends that the court should have given an instruction such as CALJIC No. 17.51. (See, e.g., *People v. Williams* (2015) 61 Cal.4th 1244, 1279-1280.)

An instruction such as CALJIC No. 17.51 is "mandatory when an alternate is substituted onto the jury *after deliberations have begun*." (*People v. Renteria* (2001) 93 Cal.App.4th 552, 557, italics added.) As respondent points out, the record shows that deliberations had not yet begun, or the jury had deliberated for no more than a few minutes. At 4:45 p.m. on October 3, immediately after final arguments and the trial court's final instructions, the jury retired to the jury room to begin deliberations. The trial court then indicated to the prosecutor and defendant that the jurors would be brought out to determine whether they thought they could reach a verdict that day or should come back the following day. The jury was brought out and questioned. They indicated that they had chosen a foreperson. The court determined that Juror No. 6 was a student with two exams scheduled for the next day, so returning to court to deliberate would jeopardize the juror's graduation, and the parties had no objection to excusing Juror No. 6. Juror No. 6 was excused, an alternate was substituted, and the court discussed with the jury a good time to begin the next day. The court told the jury, "[Y]ou cannot start deliberating until all twelve of you are here," and then gave them the challenged instruction quoted

above. The jurors were excused for the day at 5:11 p.m. Thus, 26 minutes elapsed between the time that the jurors retired to deliberate on October 3 until they were excused for the day. During that time, the jury elected a foreperson and was brought back into the courtroom for a somewhat lengthy discussion with the court. If there were any deliberations, they were necessarily brief.

Moreover, defendant has presented no evidence that there were deliberations on October 3, or that the jury did not commence deliberations anew on October 4. Any speculation would lead us to conclude that the jury did not begin its deliberations on October 3, that they had barely begun to deliberate before being called into the courtroom, or that they began to deliberate anew on October 4. Beginning deliberations anew does not require "the jury to backtrack and duplicate every discussion it had had before the new jurors were seated. 'It means in good faith they start from the beginning discussing issues and show a willingness to include the newly seated juror or jurors so that all decisions are made with all 12 jurors participating in that function.'" (*People v. Williams, supra*, 61 Cal.4th at p. 1279.) "'The newly constituted jury was not required to deliberate for the same length of time as the original jury, nor was it required to review the same evidence. . . . [Citation.]' [Citation.]" (*Id*. at p. 1280.)

Here, the reconstituted jury began deliberations at 9:30 the following morning, and requested readback at 11:20 a.m. The requested testimony was read back between 12:05 p.m. and 12:17 p.m., and the jury reached a verdict at 12:30 p.m. As the originally constituted jury had only enough time to elect a foreperson and perhaps discuss an issue for a few minutes, there is no reason to conclude that the new juror did not participate substantially in all deliberations. Under these circumstances, we

conclude that there was no error and that the court's procedure was harmless beyond a reasonable doubt.

IV. *Pitchess* motion

A *Pitchess* motion "allow[s] criminal defendants to seek discovery from the court of potentially exculpatory information located in otherwise confidential peace officer personnel records. If a party bringing what is commonly called a *Pitchess* motion makes a threshold showing, the court must review the records in camera and disclose to that party any information they contain that is material to the underlying case. (See Evid. Code, §§ 1043, 1045.)" (*People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696, 705.)

Defendant's pretrial *Pitchess* motion sought personnel records of eight named Long Beach police officers relating to false arrests, dishonesty, fabricating of charges, illegal search and seizure, excessive force, coercive conduct, witness tampering, planting of evidence, falsifying reports, racial profiling and prejudice, including but not limited to assaulting suspects and acts of violence towards anyone in custody or apprehended. The trial court granted the motion only as to Detective Solorio, limited the inquiry to false reports, and on May 6, 2016, conducted an in camera review of the records produced by the police department. The trial court found no relevant discoverable information in that review.

Defendant requests that we review the sealed transcript of the *Pitchess* hearing for possible error. Ordinarily, we would review the trial court's determination for an abuse of discretion. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1220-1221.) Here, however, we are unable to do so, as no transcript of the May 6, 2016 in camera hearing has been made a part of the appellate record. Abuse of discretion is never presumed from a silent record, and it is the appellant's burden to present an adequate

record for review on appeal. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) "It is axiomatic that it is the burden of the appellant to provide an adequate record to permit review of a claimed error, and failure to do so may be deemed a waiver of the issue on appeal. [Citations.]" (*People v. Akins* (2005) 128 Cal.App.4th 1376, 1385.) On February 19, 2019, this court notified counsel that the transcript was not in the appellate record. As defendant has taken no steps to have the record augmented, we assume that he has abandoned his request for review.

V. Prior serious felony finding

Defendant contends that in finding that defendant's prior conviction of assault with a deadly weapon qualified as a serious felony under the Three Strikes law, the trial court engaged in prohibited judicial factfinding in violation of his rights under the Sixth Amendment to the United States Constitution.

Defendant's prior conviction was a violation of former section 245, subdivision (a)(1), under which an assault was committed either with a deadly weapon, or by means of force likely to cause great bodily injury.[8] Under the Three Strikes law, assault with a deadly weapon is a "serious felony" which constitutes a strike, whereas assault by means of force likely to cause great bodily injury is not. (See § 667, subd. (a); § 1192.7, subd. (c); *People v. Gallardo* (2017) 4 Cal.5th 120, 123

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[8] At the time of the offense, section 245, subdivision (a)(1), punishes assaults "with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury." (Stats. 1993, ch. 369, § 1.) In the current version of section 245, punishment for assault with a deadly weapon remains in subdivision (a)(1), while assault by means of force likely to produce great bodily injury is found in subdivision (a)(4).

(*Gallardo*).) Defendant contends that when the trial court determined that the prior conviction was for assault with a deadly weapon and thus a strike offense, it made its determination in violation of the rule of *Apprendi v. New Jersey* (2000) 530 U.S. 466, which held that to comply with the Sixth Amendment to the United States Constitution, "any fact, other than the fact of a prior conviction, that increases the statutorily authorized penalty for a crime must be found by a jury beyond a reasonable doubt." (*Gallardo*, at p. 123.)

In particular, defendant contends that the trial court was required to apply the federal "categorical approach" of looking solely to the elements of the offense to determine whether the prior conviction was an assault with a deadly weapon or an assault by means of force likely to produce great bodily injury, rather than the "modified categorical approach," which would permit review of such documents as "for example, the indictment, jury instructions, or plea agreement and colloquy." (See *Mathis v. United States* (2016) 579 U.S. __ [136 S.Ct. 2243, 2247-2249] (*Mathis*); *Descamps v. United States* (2013) 570 U.S. 254, 257 (*Descamps*).)[9]

Neither *Mathis* nor *Descamps* required California courts to use either approach in determining whether a California statute constitutes a serious felony under the Three Strikes law, and neither decision held that the Sixth Amendment prohibited trial courts from reviewing the record of conviction. Indeed, the two cases did not directly affect or "squarely overrule existing

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9 Respondent contends that defendant's claim is forfeited, as defendant did not raise an objection below based upon *Descamps*. However, as defendant was sentenced prior to the publication of *Gallardo*, the issue is not forfeited. (See *People v. Hudson* (2018) 28 Cal.App.5th 196, 207.)

California law [but] discussed the relevant Sixth Amendment principles only en route to construing the federal statute at issue to avoid constitutional concerns. [Citation.]" (*Gallardo, supra*, 4 Cal.5th at p. 128.) Although *Descamps* and *Mathis* were decided on federal statutory grounds not constitutional grounds, the California Supreme Court was guided by the United States Supreme Court's discussions in those cases to infer greater limitations imposed by the Sixth Amendment on "a judge's authority to make the findings necessary to characterize a prior conviction as a serious felony." (*Gallardo*, *supra*, at p. 124, and see pp. 130-134, 137.)

Prior to *Mathis* and *Descamps*, the California Supreme Court held that the Sixth Amendment permitted courts to undertake a limited review of the record of a defendant's prior conviction to determine whether the crime qualified as a serious felony, "to determine whether 'the conviction *realistically* may have been based on conduct that would not constitute a serious felony under California law.' [Citation.]" (*Gallardo, supra*, 4 Cal.5th at p. 124, italics added, quoting *People v. McGee* (2006) 38 Cal.4th 682, 706 (*McGee*).) The trial court in *Gallardo* had followed *McGee*, to "[review] preliminary hearing testimony to determine what conduct likely (or 'realistically') supported the defendant's conviction." (*Gallardo*, at pp. 123-124, 126.) In *Gallardo*, the court disapproved the approach in *McGee*, and "[held] that a court considering whether to impose an increased sentence based on a prior qualifying conviction may not determine the 'nature or basis' of the prior conviction based on its independent conclusions about what facts or conduct 'realistically' supported the conviction. [Citation.] That inquiry invades the jury's province by permitting the court to make disputed findings about 'what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct.' [Citation.]

The court's role is, rather, limited to identifying those facts that were established by virtue of the conviction itself -- that is, facts the jury was necessarily required to find to render a guilty verdict, or that the defendant admitted as the factual basis for a guilty plea." (*Gallardo, supra*, at p. 136, fn. omitted.)

Here, the trial court did not review the preliminary hearing testimony, receive evidence of any disputed fact, or make any independent finding based upon disputed facts. The court reviewed certified court documents pertaining to Los Angeles Superior Court case No. BA101323, including the charging documents, the minute order which set out the verdict form verbatim, and the abstract of judgment.[10] The court thus based its determination upon facts that were established by virtue of the conviction itself, most notably, the verdict, which stated: "'We, the jury in the above-entitled action, find the Defendant, GERALD PATRICK MATHIS, GUILTY of the crime of ASSAULT WITH A DEADLY WEAPON, in violation of Penal Code Section 245(a)(1), a felony, as charged in Count 2 of the Information.'" We conclude that the trial court did not engage in independent factfinding prohibited by the Sixth Amendment.

VI. Substantial evidence supports serious felony finding

Defendant also contends that the trial court's finding that defendant's prior conviction was for assault with a deadly weapon was not supported by substantial evidence.

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[10] The documents were admitted as exhibit 46 at trial on the prior convictions. Exhibit 46 has not been made part of the record on appeal, and although we have reviewed the superior court file, we did not locate the exhibit. However, the prosecution witness read relevant portions into the record, and defendant explains here that the exhibit was returned to the prosecution and copies of the same documents are attached to his sentencing memorandum as exhibit A.

"On review, we examine the record in the light most favorable to the judgment to ascertain whether it is supported by substantial evidence. In other words, we determine whether a rational trier of fact could have found that the prosecution sustained its burden of proving the elements of the sentence enhancement beyond a reasonable doubt. [Citations.]" (*People v. Delgado* (2008) 43 Cal.4th 1059, 1067.)

Defendant contends that although the verdict form stated that the jury found him guilty of assault with a deadly weapon, the addition of the phrase, "as charged in the information," created an ambiguity that was not resolved by other evidence. The information alleged that "the crime of ASSAULT GREAT BODILY INJURY AND WITH DEADLY WEAPON, in violation of PENAL CODE SECTION 245(a)(1), a Felony, was committed by [defendant], who did willfully and unlawfully commit an assault upon [the victim] with a deadly weapon, to wit, a metal pointed stake, and/or, and by means of force likely to produce great bodily injury." The abstract of judgment similarly states: "ASSLT GREAT BODILY INJURY W/DEADLY WPN."

Similar language and abbreviations have been found to be ambiguous, as it "could be read to mean that the assault was committed both by means of force likely to produce great bodily injury *and* with a deadly weapon, [and] it could also be construed as a shorthand description of the criminal conduct covered by section 245, subdivision (a)(1) -- assault by means of force likely to product great bodily injury *or* with a deadly weapon." (*People v. Banuelos* (2005) 130 Cal.App.4th 601, 606.)

Here, however, the inclusion in the information of a description of the weapon, a metal pointed stake, suggests an allegation that the alleged assault was committed by means of a deadly weapon, not simply by means of force likely to cause great bodily injury. We disagree with defendant that *People v.*

Learnard (2016) 4 Cal.App.5th 1117, precludes such an inference in this case. There, the court found the evidence insufficient where the ambiguous allegation in the information included reference to the weapon, a baseball bat, but the defendant's guilty plea did not specify that it was used in the assault. (*Id*. at pp. 1121-1124.) The court explained that "the mere fact of a conviction for aggravated assault under former section 245, subdivision (a)(1) would be insufficient to establish the prior conviction was a strike in any case in which the verdict or plea did not specify the precise means used to commit the offense. [¶] . . . [¶] A plea of no contest admits the elements of the crime, but does not constitute an admission of any aggravating circumstances. [Citation.]" (*Learnard*, at p. 1122.)

Here, the verdict specified the precise means used to commit the offense: a deadly weapon. We reject defendant's suggestion that the verdict form can reasonably be construed to incorporate by reference all the ambiguities in the information. There is nothing in the verdict form that can be construed as incorporating more than assault with a deadly weapon as the means of violating former section 245, subdivision (a)(1). We conclude that the description of the weapon in the information, when considered with the verdict, provided substantial evidence from which a rational trier of fact could find beyond a reasonable doubt that the prior conviction was for assault with a deadly weapon.

VII. Unauthorized five-year enhancements

Defendant contends that the imposition of five-year recidivist enhancements imposed as to counts 5 and 6 pursuant to section 667, subdivision (a)(1), were unauthorized and must be stricken. Respondent agrees. Both parties point out that section 667, subdivision (a)(1), provides that the sentence imposed upon conviction of a serious felony shall be enhanced by five years due

to each prior conviction of a serious felony, as listed in section 1192.7, subdivision (c). Counts 5 and 6 alleged false imprisonment by violence in violation of section 236, and defendant was convicted of those counts as charged; however false imprisonment by violence is not listed in section 1192.7.[11] The enhancements will be stricken.

VIII. Custody credit

Defendant asks that the judgment be corrected to state all presentence custody credit dating from the time of his arrest instead of the time of his first appearance. Respondent agrees and asserts that defendant is entitled to credit of 1,689 actual days plus 15 percent for conduct credit, for a total of 1,942 days of custody credit, instead of the 1,027 days awarded.

"Persons who remain in custody prior to sentencing receive credit against their prison terms for all of those days spent in custody prior to sentencing, so long as the presentence custody is attributable to the conduct that led to the conviction. (§ 2900.5.)" (*People v. Duff* (2010) 50 Cal.4th 787, 793.) "It is the duty of the court imposing the sentence to determine the date or dates of any admission to, and release from, custody prior to sentencing and the total number of days to be credited pursuant to this section." (§ 2900.5, subd. (d).)

The trial court awarded credit for 893 actual days in custody, calculated from the date of first appearance on November 5, 2015, to April 28, 2017, the day of sentencing, plus 134 days of conduct credit calculated at 15 percent, for a total of 1,027 days. Both defendant and respondent represent that defendant was arrested on the day the crimes were committed,

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[11] We also observe that the information did not allege enhancements pursuant to section 667, subdivision (a)(1), as to counts 5 and 6, but only as to counts 1 and 2.

September 13, 2012, and remained in custody from the date of his arrest through sentencing.

The probation reports states that defendant was arrested on *December* 13, 2012. The parties do not address this notation, but point out that Officer Solorio testified that he arrested defendant on September 13, 2012. Defendant does not address the time between arrest and first appearance, and the appellate record is silent as to what occurred during that time. The superior court file has been transmitted to this court and the earliest minute order in the file is dated November 5, 2015, the date which the trial court found to be defendant's first appearance. The minute order states that the complaint was filed in this case on November 5, 2015, and that on that date, the case was called for a bench warrant hearing, an arrest warrant was issued and recalled, and defendant was arraigned on the complaint and remanded.

As the trial court's orders are presumed correct, it is defendant's burden to affirmatively demonstrate error and to present a record adequate for review. (See *Denham v. Superior Court*, *supra*, 2 Cal.3d at pp. 564-565.) As it appears that defendant was out of custody for an unknown period between the date of his arrest and November 5, 2015, defendant has not met his burden on appeal to demonstrate that the trial court erred.

IX. Senate Bill No. 1393

Defendant asks that the matter be remanded to give the trial court the opportunity to exercise its discretion whether to strike the recidivist enhancements imposed as to counts 1 and 2.

Effective January 1, 2019, under the recently enacted amendments to sections 667, subdivision (a)(1), and 1385, subdivision (b), trial courts have discretion to strike sentencing enhancements for prior serious felony convictions in the interest of justice. (Stats. 2018, ch. 1013, §§ 1 & 2.) The parties agree

that the statute applies to defendant under the rule of *In re Estrada* (1965) 63 Cal.2d 740, 744-745. (See *People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) Remand is required in cases such as this, where the sentencing record does not indicate that the trial court "would not, in any event, have exercised its discretion to strike the [sentence enhancement]. [Citation.]" (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530, fn. 13 (amended Three Strikes law); see also *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1080-1081 [amended firearm enhancement statute].)

At the time of sentencing, the trial court denied defendant's motion to strike one of the strike offenses, stated some factors in aggravation, and imposed middle-term determinate sentences. The court observed that there were two victims of the robbery, the victims thought that defendant was armed with a gun, which terrified them, one of the victims was a child, and the crime involved a great deal of planning, sophistication, and professionalism. As respondent observes, it is unlikely in view of the court's comments at sentencing that it will exercise its discretion in defendant's favor, but the court made no comment which clearly indicated that it would not do so. Under such circumstances, the better practice is to remand the matter for the limited purpose of allowing the trial court to consider whether to strike the enhancements. (See *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110-1111.)

DISPOSITION

The judgment of conviction is affirmed. The enhancements imposed upon the sentences for counts 5 and 6 pursuant to section 667, subdivision (a)(1), are stricken and the trial court is directed to prepare an amended abstract of judgment and forward it to the Department of Corrections and Rehabilitation. The matter is remanded for the trial court to exercise its

discretion whether to strike the enhancements imposed under section 667, subdivision (a)(1). If the court elects to exercise this discretion, defendant shall be resentenced, and the new sentence shall be noted in the amended abstract of judgment. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT